

AMENDED IN ASSEMBLY JANUARY 4, 2010

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

ASSEMBLY BILL

No. 633

Introduced by Assembly Member Ammiano

February 25, 2009

~~An act to amend Section 190.4 of the Penal Code, relating to the death penalty.~~ *An act to amend Section 2636 of the Penal Code, relating to the Department of Corrections and Rehabilitation.*

LEGISLATIVE COUNSEL'S DIGEST

AB 633, as amended, Ammiano. ~~Death penalty.~~ *Department of Corrections and Rehabilitation: inmates and wards: classification.*

Existing law requires the Department of Corrections and Rehabilitation to classify inmates and wards in order to prevent inmate and ward sexual violence and to promote inmate and ward safety, as specified. Existing law also requires the department to consider specified risk factors when classifying the inmate.

This bill would add the sexual orientation and gender identity of the inmate or ward, as specified, to the list of risk factors to be considered, and would provide related directions to the department.

The bill would prohibit this section from being construed to require or justify expansion or construction of department facilities.

~~Existing law, as amended by the Briggs Initiative at the November 7, 1978, statewide general election, provides that in any case in which the defendant has been found guilty of first degree murder by a jury, and the jury has been unable to reach an unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled~~

~~to try the remaining alleged special circumstances. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court is required to dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.~~

~~This bill would instead provide that in any case in which the defendant has been found guilty of first degree murder by a jury, and the jury has been unable to reach an unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and impose a punishment of confinement in state prison for a term of 25 years.~~

~~This bill would provide for the submission of its provisions to the voters for approval.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~ yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. (a) *The Legislature finds and declares that*
2 *inmates and wards of the Department of Corrections and*
3 *Rehabilitation may be at a heightened risk of sexual violence and*
4 *abuse based on certain risk factors, including being young, being*
5 *lesbian, gay, bisexual, or transgender, not having served a prior*
6 *term of commitment, or having a history of mental illness.*

7 (b) *It is the intent of the Legislature in enacting this act to ensure*
8 *that the Department of Corrections and Rehabilitation (1)*
9 *recognizes that wards or inmates may be at increased risk based*
10 *on these factors, and (2) provides vulnerable inmates or wards*
11 *who are determined to be at risk with heightened protection in*
12 *classification and housing decisions, without automatically*
13 *subjecting them to highly restrictive or isolated settings or denying*
14 *them access to programs and services.*

15 SEC. 2. *Section 2636 of the Penal Code is amended to read:*

16 2636. For the purposes of this section, all references to
17 classification of wards shall take effect upon the adoption of a
18 classification system for wards developed by the Department of

1 Corrections and Rehabilitation in compliance with *Farrell v. Allen*,
2 Alameda County Superior Court Case No. RG 03079344.

3 The following practices shall be instituted to prevent sexual
4 violence and promote inmate and ward safety in the Department
5 of Corrections and Rehabilitation:

6 (a) The Department of Corrections and Rehabilitation inmate
7 classification and housing assignment procedures shall take into
8 account risk factors that can lead to inmates and wards becoming
9 the target of sexual victimization or of being sexually aggressive
10 toward others. Relevant considerations include:

11 (1) Age of the inmate or ward.

12 (2) *Self-reported safety concerns related to the sexual*
13 *orientation and gender identity of the inmate or ward.*

14 (2)

15 (3) Whether the offender is a violent or nonviolent offender.

16 (3)

17 (4) Whether the inmate or ward has served a prior term of
18 commitment.

19 (4)

20 (5) Whether the inmate or ward has a history of mental illness.

21 (b) The Department of Corrections and Rehabilitation shall
22 ensure that staff members intervene when an inmate or ward
23 appears to be the target of sexual harassment or intimidation.

24 (c) *The Department of Corrections and Rehabilitation shall not*
25 *require any inmate or ward to disclose or report his or her sexual*
26 *orientation or gender identity at any time, and a disclosure or*
27 *report shall not be discredited solely because it was not provided*
28 *at an earlier point in time.*

29 (d) *The Department of Corrections and Rehabilitation is*
30 *prohibited from disciplining or otherwise punishing an inmate or*
31 *ward if the inmate or ward fails to disclose or report his or her*
32 *sexual orientation or gender identity during all or part of his or*
33 *her term of commitment.*

34 (e) *Nothing in this section shall be construed to require or justify*
35 *expansion or construction of Department of Corrections and*
36 *Rehabilitation facilities.*

37 ~~SECTION 1. Section 190.4 of the Penal Code is amended to~~
38 ~~read:~~

39 ~~190.4. (a) Whenever special circumstances as enumerated in~~
40 ~~Section 190.2 are alleged and the trier of fact finds the defendant~~

1 guilty of first degree murder, the trier of fact shall also make a
2 special finding on the truth of each alleged special circumstance.
3 The determination of the truth of any or all of the special
4 circumstances shall be made by the trier of fact on the evidence
5 presented at the trial or at the hearing held pursuant to Subdivision
6 (b) of Section 190.1.

7 In case of a reasonable doubt as to whether a special
8 circumstance is true, the defendant is entitled to a finding that is
9 not true. The trier of fact shall make a special finding that each
10 special circumstance charged is either true or not true. Whenever
11 a special circumstance requires proof of the commission or
12 attempted commission of a crime, such crime shall be charged and
13 proved pursuant to the general law applying to the trial and
14 conviction of the crime.

15 If the defendant was convicted by the court sitting without a
16 jury, the trier of fact shall be a jury unless a jury is waived by the
17 defendant and by the people, in which case the trier of fact shall
18 be the court. If the defendant was convicted by a plea of guilty,
19 the trier of fact shall be a jury unless a jury is waived by the
20 defendant and by the people.

21 If the trier of fact finds that any one or more of the special
22 circumstances enumerated in Section 190.2 as charged is true,
23 there shall be a separate penalty hearing, and neither the finding
24 that any of the remaining special circumstances charged is not
25 true, nor if the trier of fact is a jury, the inability of the jury to
26 agree on the issue of the truth or untruth of any of the remaining
27 special circumstances charged, shall prevent the holding of a
28 separate penalty hearing.

29 In any case in which the defendant has been found guilty by a
30 jury, and the jury has been unable to reach an unanimous verdict
31 that one or more of the special circumstances charged are true, and
32 does not reach a unanimous verdict that all the special
33 circumstances charged are not true, the court shall dismiss the jury
34 and impose a punishment of confinement in state prison for a term
35 of 25 years.

36 (b) If defendant was convicted by the court sitting without a
37 jury the trier of fact at the penalty hearing shall be a jury unless a
38 jury is waived by the defendant and the people, in which case the
39 trier of fact shall be the court. If the defendant was convicted by

1 a plea of guilty, the trier of fact shall be a jury unless a jury is
2 waived by the defendant and the people.

3 If the trier of fact is a jury and has been unable to reach a
4 unanimous verdict as to what the penalty shall be, the court shall
5 dismiss the jury and shall order a new jury impaneled to try the
6 issue as to what the penalty shall be. If such new jury is unable to
7 reach a unanimous verdict as to what the penalty shall be, the court
8 in its discretion shall either order a new jury or impose a
9 punishment of confinement in state prison for a term of life without
10 the possibility of parole.

11 (e) If the trier of fact which convicted the defendant of a crime
12 for which he may be subject to the death penalty was a jury, the
13 same jury shall consider any plea of not guilty by reason of insanity
14 pursuant to Section 1026, the truth of any special circumstances
15 which may be alleged, and the penalty to be applied, unless for
16 good cause shown the court discharges that jury in which case a
17 new jury shall be drawn. The court shall state facts in support of
18 the finding of good cause upon the record and cause them to be
19 entered into the minutes.

20 (d) In any case in which the defendant may be subject to the
21 death penalty, evidence presented at any prior phase of the trial,
22 including any proceeding under a plea of not guilty by reason of
23 insanity pursuant to Section 1026 shall be considered in any
24 subsequent phase of the trial, if the trier of fact of the prior phase
25 is the same trier of fact at the subsequent phase.

26 (e) In every case in which the trier of fact has returned a verdict
27 or finding imposing the death penalty, the defendant shall be
28 deemed to have made an application for modification of such
29 verdict or finding pursuant to Subdivision 7 of Section 11. In ruling
30 on the application, the judge shall review the evidence, consider,
31 take into account, and be guided by the aggravating and mitigating
32 circumstances referred to in Section 190.3, and shall make a
33 determination as to whether the jury's findings and verdicts that
34 the aggravating circumstances outweigh the mitigating
35 circumstances are contrary to law or the evidence presented. The
36 judge shall state on the record the reasons for his findings.

37 The judge shall set forth the reasons for his ruling on the
38 application and direct that they be entered on the Clerk's minutes.
39 The denial of the modification of the death penalty verdict pursuant
40 to subdivision (7) of Section 1181 shall be reviewed on the

1 defendant's automatic appeal pursuant to subdivision (b) of Section
2 1239. The granting of the application shall be reviewed on the
3 People's appeal pursuant to paragraph (6).

4 SEC. 2. ~~Section 1 of this act affects an initiative statute and~~
5 ~~shall become effective only when submitted to, and approved by,~~
6 ~~the voters of California, pursuant to subdivision (e) of Section 10~~
7 ~~of Article II of the California Constitution.~~